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IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

No. [REDACTED]

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ST. REGIS PAPER COMPANY,
Petitioner,

v.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

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August, 1948.

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OCTOBER TERM, 1947

No. 841

ST. REGIS PAPER COMPANY,
Petitioner,
v.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

Respondent would have the Court view the question here presented as involving nothing more than the exercise of the President's "allocation" power under the Second War Powers Act, 1942. Throughout respondent's brief reference is made repeatedly to the exercise of the power to "allocate" materials. As its first ground for urging that the holding below accords with "established principles", respondent states (p. 6) that "*the allocation order here involved denying petitioner the pulpwood it needed to operate its plant was only one of hundreds of similar allocation orders affecting virtually all phases of*

industrial activity and business issued by various agencies of the Government during World War II, * * *". (Italics supplied.)

In its attempt to sustain that argument, respondent not only disregards the alleged facts and the official record of the acts of the responsible Government agency, but it also misrepresents the provisions of the War Production Board's General Preference Order No. M-251, the Schedule No. 1 thereto and the directives issued thereunder to this petitioner.

The petition in the Court of Claims shows that the War Production Board's General Preference Order No. M-251 provided for more than mere "allocation" of a scarce material. The petition further shows that the Order and directives to petitioner thereunder were expressly intended to have and they did have the effect of completely "shutting down" (R. 7) petitioner's mill, so that pulp production could be concentrated in other pulp mills designated by the Government agency (R. 6). As the direct result of the Government's actions petitioner was completely deprived of all use of its pulp mill in the manufacture of pulp, the only use to which it could be put, so that it became a valueless thing to petitioner (R. 6, 7).

In the petition for the writ of certiorari reference is made to the official publication of the "full and objective account of the way the Federal Government is carrying out its wartime duties" (see Foreword to "Pulp and Paper Policies of the War Production Board and Predecessor Agencies, May 1940 to January 1944, Historical Reports on War Administration: War Production Board, Special Study No. 7") which shows that the War Production Board's Order M-251 and the directives there-

under were issued pursuant to a policy of "concentration of production" in mills designated by the Government agency in the Puget Sound area in the state of Washington (see pp. 61 *et seq.*). That official record also shows that such a policy of "concentration of production" was recommended by the Army and Navy Departments in preference to the usual WPB policy of "horizontal curtailment" or "rationing" of material in order that "highly skilled" employees and other labor could be released (p. 61). For the convenience of the Court there is set out in an appendix to this brief extracts from pages 61 to 66 of that official record.

General Preference Order M-251, after describing various terms used in the Order, conferred four separate and distinct powers upon the Director General for Operations. Only the first of these, granted in clause (or subparagraph) (1) of section (or paragraph) (d), provided for "allocation of specific quantities of pulpwood of the type or types defined held or accumulated in such area from and to specific persons". The "allocation" power of clause (1) was not invoked by the Director General against this petitioner. Schedule No. 1 to M-251, to be described shortly, was not issued pursuant to that clause.

Clause (2) of M-251 conferred power to "Direct holders of pulpwood in such area to maintain in their holdings or accumulations of pulpwood * * * a stated quantity or percentage, either uniform for all such holders or particular for any, to be known as a 'Reserve Supply', available for disposition by the Director General for Operations, * * *."

If the Director General for Operations had invoked only the powers under clauses (1) or (2), obviously the shutdown of petitioner's pulp mill would not have occurred;

petitioner, presumably, would have received either its "allocated" quota of pulpwood pursuant to clause (1), or a directive pursuant to clause (2) to hold a stated portion of petitioner's accumulated inventory of pulpwood as a "Reserve Supply" available for disposition by the Government's agent, leaving the unrestricted balance of petitioner's pulpwood for petitioner's own use, and its mill would have continued in operation. In either of such events there would have been no taking of petitioner's private property.

General Preference Order M-251, however, contained two further important powers, neither one of which provided for "allocation", but both of which conferred "authorizations" to issue specific "directions" of such a prohibitory character that, when exercised as shown in the petition here, the exercise of the power actually amounted to a requisition of private property for a public purpose.

Clause (3) conferred upon the Director General for Operations the power to:

"(3) Direct that no person, or no person of a specified class, may consume, process, deliver or accept delivery of any pulpwood of the type or types defined held or accumulated in such area except upon specific authorization or direction by the Director General for Operations, and provide procedures for applying for and granting such authorization or direction;"

The allegations of the petition to the Court of Claims clearly show that it was the power to prohibit the consumption or processing of pulpwood, conferred by the provisions of the clause quoted above, that was invoked by the Director General for Operations and applied

to petitioner's pulp mill. The record also shows that in issuing Schedule No. 1 to M-251 the Director General for Operations expressly stated that he was exercising the power conferred by the foregoing clause (3). In that schedule, after defining the so-called "area" and describing the "types of pulpwood", the directive read as follows:

"Pursuant to Clause (3) of the first paragraph of said section (d), the Director General for Operations hereby directs that on and after the day upon which this Schedule is issued, and until this Schedule is revoked, no holder of pulpwood as defined in Item (3) of Paragraph (d) of M-251, shall consume, process, or deliver any such pulpwood except upon specific authorization or direction by the Director General for Operations.

"Application for authorization or direction to consume, process or transfer such pulpwood may be submitted on Form PD-556.

"Issued this 23rd day of October, 1942.

ERNEST KANZLER

Ernest Kanzler

Director General for Operations"

The petition further shows that petitioner's mill was in the defined "area", that petitioner was regarded by the Government agent as a defined "holder of pulpwood", and that in a letter also dated October 23, 1942, addressed to petitioner (R. 12, 13, Exhibit B), the Administrator of General Preference Order M-251 wrote petitioner that the War Production Board was "invoking * * * clause (3) of paragraph (d) of said Order". With this letter there were enclosed directives "to deliver specified quantities of your supply of pulpwood logs to other companies

during the month of November, 1942" and authorizations "to consume and process out of your supply of pulpwood enough logs to complete production of the pulp tonnage approved for your mill, under M-93, for October, 1942."

The letter concluded with this very important statement to petitioner:

"* * * We regret that no authorization can be extended to you to consume pulpwood of the types defined in Schedule No. 1 for November; form PDL-667, confirming this, is enclosed." (R. 13)

The petition also shows that this complete prohibition of the petitioner's right to consume or process pulpwood of the types which were required to operate petitioner's mill was continued in effect until April, 1944 (R. 7), that petitioner protested that the direct effect of such prohibition would be to take petitioner's mill property at great financial loss to petitioner (R. 6, 7), that such protest was rejected (R. 7) and that the Board, by letter dated November 6, 1942, stated (R. 7) that:

"* * * we regard the closing down of the Tacoma mill as a serious and regrettable action which we would not have taken had we seen any reasonable alternative * * *."

It is therefore established by the record here that the powers of clause (d) (3) which the Director General invoked here were not the "allocation" powers of clause (d) (1) of M-251; that the directive power of clause (d) (3) to deny a pulp mill owner the right to "consume" or "process" any pulpwood, without which such mill would have no value whatever to the owner, was ex-

pressly regarded by the Government agent as including the power to "shut down" petitioner's mill, and the exercise of such power was, we submit, equal in effect to the power to requisition "the temporary use" of petitioner's pulp mill.

The powers conferred in clause (4) of M-251, while less broad than those of clause (3), could have a similar effect. That clause (4) conferred power to:

"(4) Limit or prohibit particular uses of pulpwood of the type or types defined held or accumulated in such area. * * *"

The further sentences in this subparagraph show that M-251 expressly distinguishes between "allocation" and "authorization" and "directions", and that separate and distinct powers were conferred by subparagraphs (or clauses) (1), (2), (3) and (4) of section (d) of M-251.*

The respondent's reply brief fails to mention the distinction between the "allocation" power of paragraphs (d) (1) and (2) and the power to issue "authorizations and directions" under paragraphs (d) (3) and (4). The power to prohibit absolutely and completely the consumption and processing of the material essential to the opera-

* These sentences conferred power to require a particular manufacturer of woodpulp or other wood products to manufacture particular types and quantities of woodpulp or other wood products, or impose upon the use of such pulpwood by such person any other conditions necessary and appropriate in the public interest and for national defense. They provided that "allocations, authorizations and directions and any conditions attached thereto, and any limitations or prohibitions issued pursuant to clause (4) of the foregoing paragraph, shall be made to insure the satisfaction of requirements, direct and indirect, for the defense of the United States and for essential civilian supply, *may be made in consideration of the possible dislocation of labor, the effect of the local shortage on the national supply of products manufactured from pulpwood and woodpulp, the problems of transporting such products into and out of the area defined, and the necessity of keeping a plant in operation so that it may be able to fulfill war orders and essential requirements, and may be made in the discretion of the Director General for Operations, without regard to preference ratings.*" (Italics supplied.)

tion of a mill is obviously not an "allocation" or rationing of a material, especially where, as here, the intent and effect of the Government's act was to take from the mill owner all right to operate petitioner's mill so that production of pulp could be concentrated in other mills designated by the Government and petitioner's skilled employees and other labor thereby released.

The official report of the acts of the responsible Government officers which led to the issuance of General Preference Order M-251, to which reference has been made above, clearly shows at pages 64 to 66* that these officers not only recognized the distinction between "allocation" and other "authorizations" and "directions", which were provided under M-251, but they expressly recognized that the "directives" which made effective the concentration of production in designated mills necessarily involved "compensation".

Since the authorized directive issued to this petitioner under General Preference Order M-251 was not the exercise of the power to "allocate" material, but an absolute and complete "prohibition" of the right to consume or process pulpwood (as well as "diversion" of certain quantities of pulpwood from petitioner's inventory), thereby depriving petitioner of all right to the use of its mill in the manufacture of woodpulp, it necessarily follows that all of the cases upon which respondent relies, which involve violations of allocation or rationing orders and attacks upon the constitutionality of the empowering statutes, have no bearing on the issue here presented.

This is not a case of routing a precious material by a Government agency from a "wasteful factory to an efficient one", so that the dicta from *Stewart & Bro. v.*

* See Appendix, pages 14 to 17.

Bowles, 322 U. S. 398 (quoted at page 8 of respondent's brief) has no application; and, moreover, the case here does not involve any question of the issuance of a "suspension order" for violation of a rationing provision, as did the *Steuart* case.

Respondent suggests (brief, page 5) that petitioner's claim is predicated upon a "novel theory" that when the Government agency prohibited petitioner from using or consuming something essential to the operation of petitioner's mill, the Government agency, in effect, requisitioned the use of petitioner's mill and thus took petitioner's property for a public purpose. We respectfully submit that the theory is not novel. It was precisely upon that theory that compensation, measured by the shutdown expenses of the paper mill, was allowed to the mill owner in *International Paper Company v. United States*, 282 U. S. 399. There, a Government agency, in the exercise of war powers, prohibited the International Paper Company from using water power which was essential to the paper mill's operation and directed that the water power be diverted to other manufacturing mills designated by the Government and engaged in the production of war materials. That action by the Government resulted in the complete shutdown of the paper mill. This Court reversed the Court of Claims' dismissal of the International Company's claim for compensation for the mill shutdown expenses and held that petitioner was entitled to such compensation under the Fifth Amendment.

The claim made in the case at bar is upon the same theory. Here the absolute prohibition of petitioner's right to consume and process an essential raw material, specified portions of which in petitioner's inventory were directed to other mills designated by the Government,

resulted in the complete shutdown of petitioner's mill. Thus here, as in the *International* case, the prohibition of the right to use something essential to the operation of the mill is, in effect, a taking of the use of the mill; and, as shown in the petition for the writ of certiorari, the Second War Powers Act, 1942, expressly authorizes the Government to acquire, for war purposes, "• • • any real property, *temporary use thereof*, or other interest therein, together with any personal property located thereon • • •." (Italics supplied.)

In citing *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, and cases arising under the Fourteenth Amendment (respondent's brief, pp. 7 and 8), to sustain the argument that "the power to wage war successfully" carries with it the power to cause "substantial financial loss and incidental damage", respondent fails to include the further quotation from the opinion in that case (290 U. S. 398, at p. 426):

"• • • But even the war power does not remove constitutional limitations safeguarding essential liberties. • • •"

And while it is true, as stated by this Court in *Lichter v. United States*, — U. S. — , 92 Supreme Court Law. Ed. Advance Opinions, page 1260, decided June 14, 1948, upholding the constitutionality of the renegotiation statutes, that "in total war private property and profits" must be yielded up to the demands of the Government for war purposes, we respectfully submit that where, as here, a mill owner has suddenly been compelled to shut down his mill completely and without any opportunity to adapt the mill for the manufacture of nitrating pulps for war purposes or to continue operations of the mill at a reduced rate, as was allowed other competing mills in the same area (R. 6), the severity of the Government's prohibition

is such that compensation under the Fifth Amendment should be paid (Cf. *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 156 and cases cited).

In *Hirabayashi v. United States*, 320 U. S. 81, decided June 21, 1943, upholding the constitutionality of the Japanese segregation (curfew) military order and the subsequent confirmatory Act of Congress, it was said in the concurring opinion of Justice Murphy, at page 110:

"It does not follow, however, that the broad guaranties of the Bill of Rights and other provisions of the Constitution protecting essential liberties are suspended by the mere existence of a state of war. It has been frequently stated and recognized by this Court that the war power, like the other great substantive powers of government, is subject to the limitations of the Constitution. (citing cases) We give great deference to the judgment of the Congress and of the military authorities as to what is necessary in the effective prosecution of the war, but we can never forget that there are constitutional boundaries which it is our duty to uphold. • • •"

In the case at bar, it was said, in the opinion below (R. 30):

"This is a case of actual hardship. The damages are both real and substantial. But in the light of the decisions of the Supreme Court, the Tucker Act, and the established rules of law, this court does not have jurisdiction to grant the relief sought."

We respectfully submit that the Court below misapplied and misconstrued the applicable decisions of this Court and established rules of law, more fully pointed out in the petition for certiorari.

Finally, respondent argues (brief, page 9) that petitioner's claim is untenable because of the absence of "any showing that [petitioner's] plant did not remain at all

times within its own exclusive ownership, possession, and control, or that the Government had any semblance of ownership, possession, or use of the property' " and that because there was "no actual physical taking of any right in petitioner's property * * * petitioner's property was not 'taken' in the Fifth Amendment sense so as to entitle it to compensation thereunder."

The cases upon which respondent relies all involve entirely different situations and are, therefore, distinguishable. But the main defect in respondent's argument is that it ignores the established rule that, in enforcing the Fifth Amendment:

"* * * the question is what has the owner lost, not what has the taker gained." (*United States v. John J. Felin & Co., Inc.*, — U. S. —, 92 Supreme Court Law. Ed. Advance Opinions, page 1297, decided June 14, 1948; see also *United States v. Causby*, 328 U. S. 256, and *United States v. Miller*, 317 U. S. 369)

In conclusion we respectfully point out that this Court has previously recognized that a prohibition by Government action, although justified under a war or other emergency, which has the effect of preventing a mill owner from all operation of the mill property, deprives the owner of a valuable property right for which just compensation is payable under the Fifth Amendment (*International Paper Company v. United States*, *supra*; *Mugler v. Kansas*, 123 U. S. 623, 657).

The decision below is not only in conflict with prior decisions of this Court, but the question here presented is of such public importance that the petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.

August, 1948.

APPENDIX

Extracts from "Pulp and Paper Policies of the War Production Board and Predecessor Agencies, May 1940 to January 1944, Historical Reports on War Administration: War Production Board, Special Study No. 7".

Extracts from Pages 61 and 62.

"Concentration of production, which was at the time regarded by some officials as a possible panacea for most of the wartime production ills facing the Nation, had been approved as a policy by the War Production Board on July 21. Later events were to prove that while it was workable in a fairly small country, such as England, it was not adapted to the long distances and extremely complex structure of industry in the United States.

"On September 19 [1942], the War Manpower Commission urged the War Production Board to 'exert all possible efforts to utilize logging crews for the production of logs for lumber in order to meet the demand for an increased amount of lumber for essential war purposes' and recommended that production of non-essential wood-pulp be concentrated in areas outside of a 50-mile radius of Seattle, Bremerton, and Tacoma, in the State of Washington, and Portland, Oregon. Such concentration, the WMC stated, should preferably include the whole Northwest area, to free labor for the critical war industries there located. The War and Navy Departments joined with the WMC in recommending concentration, and Vice Admiral S. M. Robinson, in a letter to Donald M. Nelson, summarized the thinking at the time of those who favored concentration. He wrote:

'A policy of concentration is recommended for the pulp and paper industry in Washington and

Oregon, rather than horizontal curtailment. Horizontal curtailment entails the continued employment of maintenance men who are usually highly skilled and part-time employment of men who might otherwise be utilized full time in essential war work, and the continued use of equipment, material, fuel, transportation, and power. Concentration, on the other hand, would result in the maximum release of labor and other factors of production. Furthermore, a concentration program could be so framed that production would continue in those localities where the labor shortage is least acute. * * *

* * * 'It is suggested that by curtailing shipments of nonessential pulps to the East and reducing West Coast consumption, a significant portion of * * * labor could be released for employment in more essential activities. * * *

* * * 'It is therefore recommended that as many pulp and paper mills as consistent with the maximum war effort be shut down in the states of Washington and Oregon, for the purpose of releasing labor to vital war industries in these states.'

"The stage was now set for the evolution of Order M-251, concentrating pulpwood production in the Pacific Northwest. Regarded both as a measure to divert labor to the more vital war industries, and as a means of supplying essential pulps, it was made imperative by the fact that much more stringent measures intended to alleviate the general labor shortage in the West were in preparation. * * *

Extracts from Pages 64, 65 and 66.

"On October 12 [1942], Joseph Weiner, Director of the office of Civilian Supply, and Chairman of the Committee on Concentration of Production, reported that normally

he would oppose such a plan, [of concentration of production], entailing of necessity a scheme of compensation for the concentrated mills, but in view of the need for having the plan in operation before November 1, he reluctantly consented to the program.

"Original plans had been to close down three market mills: The Anacortes Pulp Company mill at Anacortes, Washington, which would release about 75 employees; the Puget Sound Pulp & Timber Company mill at Bellingham, Washington, which would release about 428 employees, and the St. Regis Pulp Company mill at Tacoma, Washington, which would release 365 employees. The Soundview Pulp Company and Weyerhaeuser Timber Company mills, both located at Everett, Washington, would be operated at 75% of capacity, with a release of about 185 employees.

"On October 16, a meeting was held with representatives of the pulp and paper industry from the Puget Sound area, with WPB, War Manpower Commission, and Committee on Concentration representatives in attendance. The following day a special meeting was held with the representative of the Puget Sound Pulp and Timber Company, who had not arrived in Washington in time for the October 16 meeting. As a result of a showing by this company that it would face bankruptcy by the closing down of its Bellingham mill, the program was revised, permitting the Bellingham mill of this company to operate at 50% of capacity, whereas the first plan had closed the mill.

"This required revision of the entire plan. The Tacoma mill of Rayonier, Inc., originally permitting a 75% operating level, was now closed down. The Everett mill of Soundview Pulp Company, and the Everett mill of Weyerhaeuser Timber Company, originally scheduled to operate at 75% of capacity, were permitted operating levels of 65% and 55% respectively. The closing of the Tacoma mill of Rayonier, Inc., had been made possible by agreement of the Army Ordnance Department to purchase nitrating pulp from the Longview mill of Weyerhaeuser

Timber Company up to full capacity. Essentially, the amount of labor released under the revision approximated that contemplated under the original plan—about 1,100 people. The War Manpower Commission was delegated the responsibility of seeing that the labor so released would actually be absorbed by the war industries.

“The concentration program had been discussed with the Canadian authorities, since it was part of the over-all pulp and paper curtailment program that would affect the economy of both countries. The Canadian authorities preferred what they called a ‘two bite’ instead of a ‘one bite’ concentration program, i.e., instead of closing the mills at once, to announce the ultimate goal to be reached and the mills to be closed, but to close the mills successively over a period of months. David Winton tended to agree with a Canadian position that an immediate drastic cut would have an adverse effect on the Canadian economy, *but the WPB concentration officials pointed out that since the concentration program involved compensation*, a ‘two bite’ program would be too difficult to handle. The ‘one bite’ program was because of U. S. insistence, agreed upon, and General Preference Order M-251 was issued by the Director General for Operations on October 26, making possible control of pulpwood in the shortage areas. (Italics supplied.)

“In accordance with the terms of this Order, the Director General issued, on October 26th, Schedule (1), defining the Puget Sound area as a critical area, and Schedule (2) defining the Columbia-Willamette area as a critical area. Pursuant to Schedule (1), he directed:

- “(a) The allocation of 51,350,000 board feet of pulpwood logs for consumption by pulp mills in the Puget Sound area for the month of November 1942; and
- “(b) The diversion of 4,000,000 board feet of pulpwood logs from pulp mills to lumber mills in the Puget Sound area for the month of November 1942.

"Three mills were closed (Anacortes Pulp Company, at Anacortes, Washington; Rayonier, Inc., at Tacoma, Washington; and St. Regis Paper Company, Tacoma, Washington) and the log usage of the other pulp and paper mills in the area was curtailed to the levels suggested in the concentration plan. Pursuant to Schedule (2) of the Order, 5,500,000 board feet of pulpwood logs were diverted from pulp mills to lumber mills in the Columbia-Willamette area for the month of November 1942.

"Order M-251 gave WPB the necessary authority for allocating pulpwood in shortage areas and for obtaining from the industry the data necessary for such allocations. *So far as the concentration principles of the order went, however,* it was discovered, as it was later discovered in other industries, that the structure of the industry was too complex, and the size of the country too large, to permit effective concentration of any industry on a Nation-wide scale." (Italics supplied. Footnote references omitted.)